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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

WALTER EUGENE GRAY,

Defendant and Appellant.

E033374

(Super.Ct.No. RIC365182)

OPINION

APPEAL from the Superior Court of Riverside County. Edward D. Webster,
Judge. Reversed.

Chris Truax, under appointment by the Court of Appeal, for Defendant and
Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney
General, Gary W. Schons, Senior Assistant Attorney General, Peter Quon, Jr.,
Supervising Deputy Attorney General, and Lilia E. Garcia, Deputy Attorney General, for
Plaintiff and Respondent.

The trial court adjudged Walter Eugene Gray to be a sexually violent predator
(Welf. & Inst. Code, § 6600 et seq.) and committed him to the Department of Mental

Health. Gray appeals, contending the trial court erroneously denied him his right to a jury trial. We conclude that the combination of the trial court's evidentiary sanctions for Gray's refusal to testify and its taking of the case from the jury by granting a directed verdict requires reversal.

PROCEEDINGS BELOW

At what began as a jury trial in March 2003, two court-appointed psychologists -- one female and one male -- testified for the People. The female psychologist concluded that Gray met the criteria of a sexually violent predator. Her opinion was based, *inter alia*, upon the results of the Static 99 test, which assesses the risk of sexual reoffending. She testified that during her August 2001 evaluation interview with Gray, he admitted engaging in masturbation and oral copulation with a 12- or 13-year-old male in the mid-1960's. These acts had resulted in Gray's being convicted of two counts of "annoying or molesting a child"¹ (Pen. Code, § 647, subd. (a)) and being committed to Atascadero State Hospital as a mentally disordered sex offender. During his interview with the female psychologist, Gray also admitted engaging in three-way sex in 1975 with his wife and a 16-year-old male. He was convicted of oral copulation (Pen. Code, § 288a) and he admitted having been committed to prison for this offense. Although the female psychologist testified that she and Gray also discussed his 1997 conviction for sexually touching a 13 year old who was using the pool at Gray's trailer park, she did not report

¹ Although this section actually refers to lewd acts in public, this is how the
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any admissions Gray made in connection with this offense. She mentioned other incidents which figured into her evaluation, which involved Gray's having sex with underaged persons for which Gray was either not charged or had had the charges dismissed, including acts of incest with his eight- and ten-year-old daughters. She reported that Gray refused to participate in sex offender treatment during his then current stay at Atascadero State Hospital and when she attempted to interview him again in September 2002, to update her evaluation, he refused to speak to her.

The male psychologist testified that when, in both August 2001 and 2002, he attempted to interview Gray for his evaluation, Gray refused to participate. He also concluded that Gray met the criteria of a sexually violent predator, basing his opinion, in part, on the results of the Static 99 test, which he termed "a moderate predictor" of recidivism. On cross-examination, he stated that the Static 99 test may permit some "double dipping," i.e., allowing a single factor to be counted more than once.

After the psychologists testified, the prosecutor announced that he would be calling Gray to testify.² Defense counsel objected on the basis of the federal and state Constitutions, saying Gray's being asked about "anything . . . sexual or even where he was at any given time would tend to incriminate him and could possibly subject him to future prosecutions." She added that Gray would not be testifying for himself and she

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prosecutor referred to it in the presence of the jury.

² *People v. Leonard* (2000) 78 Cal.App.4th 776, 792, held that this was proper,

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would advise him to assert his right not to incriminate himself “with regard to any material . . . relating to matters sexual. . . .” She pointed out that Gray’s priors could be alleged against him as enhancements in future prosecutions or could be used later as circumstantial evidence of his intent, or other matters, under Evidence Code section 1101, subdivision (b). The trial court rejected these bases for asserting the privilege against self-incrimination, and concluded that Gray had already waived his privilege regarding any matters he discussed with the female psychologist and with his retained psychologist. The prosecutor said he intended to ask Gray about his past convictions and any matter the latter discussed with the defense-retained psychologist, including descriptions Gray gave him of past offenses, some of which did not result in convictions, as the privilege would be similarly waived as to them. The trial court ruled that Gray could be asked about incidents that resulted in charges for which Gray had been convicted or which were dismissed as part of plea bargains, but not about other not yet charged incidents.³

The prosecutor called Gray to the stand and asked him if he had been convicted of two counts of violating Penal Code section 647, subdivision (a)(1), in 1965. Gray refused to answer on the ground that it would incriminate him. The trial court informed

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citing *Allen v. Illinois* (1986) 478 U.S. 364.

³ The trial court did not make clear whether it was excepting from this category incidents Gray discussed with the female psychologist or his retained psychologist, but it appears from the chronology of rulings that it was.

him that it would not⁴ and ordered him to answer. He refused. The trial court threatened him with contempt and, while opining that jailing him would be futile, promised to discuss further with counsel an appropriate evidentiary sanction against him.⁵ Still, Gray refused to answer the prosecutor's question. The trial court recessed proceedings to discuss the matter with counsel.

The prosecutor had a fingerprint examiner roll Gray's prints, compare them to the prints of the person convicted of the above mentioned 1965, 1975 and 1997 priors and testify that they matched.⁶

While discussing potential sanctions for Gray's failure to answer the prosecutor's questions, defense counsel informed the trial court that she intended to have her retained psychologist testify not only to his opinion that Gray did not meet the criteria for a sexually violent predator,⁷ but as "a statistician[, he would testify] . . . at great length . . .

⁴ In *Ex Parte Cohen* (1894) 104 Cal. 524, 528, the California Supreme Court held: "If, at the time of the transactions respecting which his testimony is sought, . . . the witness has been tried for the offense and . . . , if convicted, has satisfied the sentence of the law. . . [,] he cannot claim any privilege under the provision of the constitution, since his testimony could not be used against him in any criminal case against himself, and consequently he is not compelled to be a witness 'against himself.'"

⁵ Later, outside the presence of the jury, the trial court elaborated that since it ultimately concluded that Gray was a sexually violent predator and would be returned to Atascadero State Hospital for two years, jail time was no real sanction.

⁶ Before this expert testified, the trial court informed the jury that the prosecutor "had" to do this because Gray "would not testify."

⁷ This expert's evaluation report had been provided to the prosecution and is part
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about the statistical problems with the Static 99 [test], which was used by the People's experts, and . . . talk about the aspect of aging-out in terms of sexual offense recidivism."⁸ Defense counsel had earlier informed the trial court that it had not yet decided whether to also call Gray's youngest daughter to testify.⁹ By the time the trial court indicated it would grant a directed verdict, it appeared as though the defense intended to call her as a witness. The trial court noted that this was the assumption it made when it granted the motion for a directed verdict.

After Gray again refused to testify, the trial court granted, over defense objection, a directed verdict, pursuant to Code of Civil Procedure section 630, subdivision (c), finding Gray to be a sexually violent predator. It elaborated that the 1965, 1975 and 1997 priors qualified as sexually violent offenses and it believed the prosecution's experts' opinions that Gray was a pedophile who was likely to reoffend, adding that the case was

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of this record.

⁸ Gray was 66 at the time of the hearing. While the prosecution's female psychologist testified that because Gray tended to target victims outside his family and committed his last sex offense at age 60, his age was not a mitigating factor in terms of the probability of his reoffending, she conceded on cross-examination that the recidivist rate among offenders Gray's age was 7 percent. The prosecution's male psychologist testified that while testosterone levels and therefore, perhaps, incidents of offending drop as offenders age, "there's mixed research in reference to age" because the studies of older offenders did not distinguish between voluntary and involuntary reasons for cessation in offending.

⁹ A foundational hearing on the relevancy of this anticipated testimony was to take place the afternoon of March 14, 2003. The trial court's granting of the directed verdict as its first order of business on that day forestalled the hearing. Consequently, a detailed
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not close. It further found that Gray's retained psychologist should not be allowed to testify to his opinion that Gray did not fit the criteria for a sexually violent predator because that opinion was based, at least in part, on matters Gray told the expert, which matters were not subject to cross-examination due to Gray's refusal to be questioned by the prosecutor.

As to this expert's anticipated testimony about the inaccuracy of the Static 99 test, the trial court said, "[T]he . . . case would go to the jury with the opinion of the two [prosecution] psychologists, . . . Gray's history and an expert coming in talking about the problems with the Stat[ic] 99 [test], which would be hardly persuasive under the circumstances. [¶] But more significantly is that . . . CALJIC 2.80 says that a jury is not required to . . . accept an expert opinion, but to give it the weight to which they find it to be entitled. In this case the defendant's testimony as to what his motivation was or how he perceived the [prior incidents] are critical and the jury has every right to have this evidence presented. In fact, it may even be more persuasive than any thirdhand evidence from an expert as to what their perceptions are. [¶] And if the defendant gets on the stand and says that he was, essentially, seduced by a 13 year old or that the 13 year old put him in a position where he couldn't resist, that would be extremely persuasive evidence that the defendant is either not being honest or has a problem that even he doesn't recognize that must be dealt with before he is safe to be allowed on the streets, and that evidence is being prevented from being heard by the jury and there is no

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description of her expected testimony is not part of this record.

adequate substitute for that testimony. [¶] [Gray's] description of why he had sex with a 13 year old in 1965, why he had sex with a 16 year old in 1975, and why he put his hand down the pants of a 13 year old in 19[97] is . . . [¶] . . . the best source of evidence for the jury to make their decision about whether or not [he is] dangerous”

Gray here contests the propriety of the trial court's granting of a directed verdict. We determine that reversal is required.

DISCUSSION

Welfare and Institutions Code section 6603, subdivision (a) provides that a trial in which it is determined whether a defendant is a sexually violent predator is to be before a jury and its determination that the defendant is such a person must be unanimous.

Section 6604 of that code provides that the People have the burden of proving that the defendant is a sexually violent predator beyond a reasonable doubt. As previously noted, the prosecutor may call the defendant as a witness without violating the latter's right not to incriminate him- or herself, because sexually violent predator proceedings are civil, not criminal in nature.¹⁰

Citing no authority dealing with sexually violent predator cases, Gray reasserts one of the points he made below, i.e., that he had a right not to be asked whether he suffered his 1965, 1975 and 1997 convictions because his admissions could be used

¹⁰ See footnote 2, *supra*. Even Gray does not appear to assert otherwise.

against him in the future.¹¹ Specifically, he mentions the three strikes law and Penal Code section 290, which requires registration of sex offenders. However, neither his 1965 misdemeanor convictions nor his 1975 conviction for violating Penal Code section 288a constitute strikes, although his 1997 offenses do. (Pen. Code, § 667, subds. (b)-(i); 1192.7, subd. (c).) As to Penal Code section 290, subdivision (a)(2)(A), it requires Gray to register as a sex offender due to his 1975 and 1997 convictions and it punishes any failure by him to do so. However, it is *the fact* of these convictions, not admissions he may have made at this trial to having suffered them, that automatically triggered, long before this trial, the registration requirement and it will be his failure in the future to abide by those requirements, and not these admissions, that subjects him to penal consequences under the section. (See *Blackburn v. Superior Court* (1993) 21 Cal.App.4th 414; *Troy v. Superior Court* (1986) 186 Cal.App.3d 1006, 1013.)¹²

¹¹ He concedes that he could be asked “about the details of prior incidents that resulted in convictions, so long as no future prosecution or penalty may arise out of those details.”

¹² In *Blackburn v. Superior Court*, *supra*, 21 Cal.App.4th 414, the defendant, who was being sued by his molestation victim, following his criminal convictions for his acts with her, invoked the privilege against self-incrimination during his deposition on the ground that his statements could be used against him as Evidence Code section 1101, subdivision (b) evidence in future prosecutions. (*Id.* at p. 420.) The appellate court found his invocation inappropriate, saying, “[T]he central standard for the privilege’s application has been whether the claimant is confronted by *substantial and ‘real,’ and not merely trifling or imaginary*, hazards of incrimination. . . .’ [¶] . . . [¶] [T]he procedural safeguards available to [the defendant under Evidence Code section 1101, subdivision (b)] appear to be more than sufficiently protective. He has not demonstrated a reasonable belief that his testimony in this civil case will require him to incriminate

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Having determined that the trial court was at least partially correct in concluding that Gray's refusal to testify based on the privilege against self-incrimination was meritless, we turn to the propriety of the sanctions imposed for that refusal. Whether one views the sanctions imposed below as the trial court's refusal to permit the defense-retained expert and Gray's daughter to testify, thereby providing a basis for the granting of the directed verdict, or that the sanctions including the granting of the directed verdict, the result is the same. Gray was deprived of the opportunity to put on any affirmative evidence.

"The rule which withholds relief to one who is in contempt of court is essentially one whose administration lies within the sound discretion of the court." (*Batchelor v. Finn* (1959) 169 Cal.App.2d 410, 418.) "There is a wide range of civil sanctions that may be imposed upon a civil litigant who invokes his or her Fifth Amendment right. The striking of the pleading and allowing the case to proceed by default against the party

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himself. . . . In order to demonstrate that his assertion of the privilege should be sustained, [defendant] must satisfy the trial judge that . . . his testimony will involve acts so distinctive and unique that the evidence could be admitted in a later prosecution against him." (*Id.* at pp. 429, 431, original italics.)

In *Troy v. Superior Court*, *supra*, 186 Cal.App.3d 1006, the appellate court found that there was no right against self-incrimination available for a judgment debtor who refused to answer questions during a debtor's examination because his answers could become "a link in the chain" of evidence leading to future criminal prosecutions of him. (*Id.* at p. 1012.) Citing a case holding that "even the pendency of criminal proceedings does not relieve a witness of his obligation to testify in a civil proceeding, unless he can demonstrate a 'nexus' between the risk of conviction and the information requested" (*id.* at p. 1013, fn. 5), the appellate court noted that there was pending neither a criminal prosecution against the debtor nor even an investigation involving him. (*Id.* at p. 1013.)

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asserting the privilege is extremely harsh, the application of which requires careful examination of important policy considerations. . . . [T]he civil consequences of the invocation . . . may well depend on whether the party asserting the privilege is the plaintiff or the defendant. . . . [T]he plaintiff has initiated the action and bears the burden of proving his claim, the defendant is merely an involuntary participant. Where the plaintiff in a civil action refuses to testify . . . , the action may be dismissed by the court because ‘One may not invoke the judicial process seeking affirmative relief and at the same time use the privileges granted by that process to avoid development of proof having a bearing upon his rights to such relief.’ [Citation.] However, as far as the defendant is concerned, the rule is different because defendants are forced to partake of the action if they would defend their interests. Although lesser civil sanctions may be imposed upon a defendant who asserts the Fifth Amendment privilege, the overwhelming majority of cases hold that the striking of the defendant’s answer and the resultant default procedure are too harsh a sanction for exercising an important constitutional right. [¶] . . . [¶] [Here, t]he striking of the answer and resultant proceeding by default gave [the plaintiffs] a totally unjustified advantage in proving their claim, for it prevented their proof from being tested by cross-examination, and by contrary evidence Such conduct by the trial court effectively denied [the defendants] their fundamental right to a trial simply because they invoked their constitutional right. Such ruling was unnecessary

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[and] [¶] . . . [¶] . . . denied them their day in court[,] . . . requir[ing] reversal.” (*Alvarez v. Sanchez* (1984) 158 Cal.App.3d 709, 712-713, 714-715, fn. omitted.)

While the trial court here would have been justified in imposing sanctions on Gray for his refusal to testify,¹³ what it essentially did, with the exception of allowing him to cross-examine the prosecution psychologists, was to deny him his day in court. The fact that Gray suffered the prior convictions already mentioned was almost a foregone conclusion. Both psychologists testified that the records they examined supported this. Gray even discussed with the female psychologist the circumstances surrounding the crimes, admitting having been convicted of some of them. The prosecution’s fingerprint expert, for all practical purposes, nailed the matter. Little would have been added to the prosecution’s case by getting Gray to admit having suffered them. The female psychologist testified to Gray’s efforts to mitigate his involvement with his victims. Little would have been added to the prosecution’s case by getting Gray to repeat this in front of the jury. We understand the trial court’s frustration with Gray’s stubborn and unjustified refusal to be examined by the prosecutor, but the price he paid for it was too

¹³ To assist the trial court should Gray again refuse to testify at retrial, we suggest the following sanctions, individually or in combination:

1. Jailing him until he agrees to testify;
2. Prohibiting the defense expert and Gray’s daughter from testifying to anything Gray told them about his prior offenses or to any conclusions they reached based on what he said to them; and
3. Fashioning a jury instruction that Gray’s refusal to testify may be viewed by the jury as an admission by him that he is a sexually violent predator, or an appropriately reworded version of CALJIC No. 2.62

dear. Gray was the defendant in this action, having been involuntarily brought into the process by the People, who had the burden of proving to a unanimous jury that he was a sexually violent predator. He was deprived of the opportunity to affirmatively call the conclusions reached by the prosecution's experts into question by the testimony of his expert on the Static 99 test and on his age,¹⁴ assuming a proper sanction would have been to prevent the latter from testifying to any conclusion he reached based on things Gray had told him.

In *People v. Cosgrove* (2002) 100 Cal.App.4th 1266, this court overturned a trial court's granting of a directed verdict in a mentally disordered offender case¹⁵ where the defendant presented no evidence. We noted that the statutory provisions governing such

¹⁴ The People asserted at oral argument that since the defense expert conceded in his report that the Static 99 test was "probably the best currently available," we should not conclude that the granting of the directed verdict was not harmless beyond a reasonable doubt. First, there is no indication in the record before us that the trial court had read the expert's report at the time it granted the directed verdict. Second, the report went on to state that the Static 99 "contains only static risk factors; that is, factors which do not change over time." Considering Gray's advanced age, the report continued, his chances of reoffending were more reasonably stated as then being 5 percent or less. Even assuming that the results of Gray's Static 99 test, which placed his chances of reoffending at 26 percent, were correct, the report concluded, this did not meet the requirement that he was likely to reoffend. Thus, contrary to the People's assertion, the report did not logically preclude or contradict this expert's anticipated testimony "about the statistical problems with the Static 99. . . ." Additionally, it corroborated the expert's anticipated testimony about the interrelationship between Gray's advanced age and his chances of reoffending. Finally, there also remained the issue of Gray's daughter's testimony, which appeared to be unrelated to the expert's testimony.

¹⁵ The parties do not assert any basis for approaching cases involving sexually violent predators differently from cases involving mentally disordered offenders. Our research reveals that they are viewed as being interchangeable, at least for purposes of the

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trials provide for jury trial, waivable only by both parties. (*Id.* at p. 1269.) We held that while there was no constitutional right to a jury, because such trials are civil, rather than criminal, in nature, the granting of the directed verdict deprived the defendant of his statutory right to a jury trial, along with a unanimous determination and proof beyond a reasonable doubt. (*Id.* at pp. 1270-1275.) We held that the error was subject to harmless error analysis under *People v. Watson* (1956) 46 Cal.2d 818, 836. (*People v. Cosgrove, supra*, 100 Cal.App.4th at pp. 1275-1276.) Citing the overwhelming evidence that the defendant met the criteria for a mentally disordered offender,¹⁶ and the fact that the defendant presented no evidence to the contrary, we concluded that it was not reasonably probable that a result more favorable to the defendant would have been reached had the jury, instead of the trial court, made that determination. (*Id.* at p. 1276.)

A little over two weeks after we authored *Cosgrove*, the California Supreme Court decided *People v. Hurtado* (2002) 28 Cal. 4th 1179. Therein, the trial court had failed to instruct the jury on a requirement for the finding that the defendant was a sexually violent predator. Our high court rejected the defendant's contention that the error was structural in nature, and, therefore, reversible per se, noting that the defendant had not asserted that he had any additional evidence to present or argument to make on the issue. (*Id.* at pp.

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issue raised here.

¹⁶ As part of this, we noted that defense counsel's cross-examination of the prosecution's experts, whose determination that defendant was a mentally disordered offender we termed "unrefuted," "was minimal." (*People v. Cosgrove, supra*, 100
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1191-1192.) However, acknowledging the criminal case-like trappings of sexually violent predator proceedings and their serious consequences to the defendant, the court held that the standard applied to jury instruction error in criminal cases, i.e., whether the error was harmless beyond a reasonable doubt, also applied to these proceedings. (*Id.* at pp. 1192-1194.)

Extending the reasoning of *Hurtado* to this case, an argument can be made, and is by Gray, that the trial court's action had the effect of depriving him of his right to present an affirmative defense and to argue his case to the trier of fact, either justifying reversal without resort to harmless error analysis. (See *Lankford v. Idaho* (1991) 500 U.S. 110, 126-127 [111 S.Ct. 1723, 1732-1733; *Herring v. New York* (1975) 422 U.S. 853, 859-865[95 S.Ct.2550, 2554-2556].) Analytically complicating such an approach, however, is the procedural context of this particular case. The trial court was aware of the crux of the defense expert's anticipated testimony and expressly rejected it as a fact finder.¹⁷ In response to the trial court's stating that it intended to grant a directed verdict, defense counsel made a lengthy argument concerning the deficiencies she perceived existed in the prosecution's case. This statement could be construed as closing argument to the trial court as fact finder. That would leave as the only error the deprivation of Gray's

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Cal.App.4th at p. 1276.)

¹⁷ Of course, this still left Gray's daughter's anticipated testimony, which was never described in detail to the trial court nor deemed unworthy of belief by it.

statutory right to a jury trial, which, under *Cosgrove*, required the application of the *Watson* test.

Gray also urges us to accept the middle ground, that the error should be tested by the *Chapman*¹⁸ “harmless beyond a reasonable doubt” standard. Certainly, there can be no dispute that the practical effect of the trial court’s action was to deprive the defendant of his constitutional right to present a defense to the jury and to argue the case to its members. In light of *Hurtado*, no lesser standard than *Chapman* would be appropriate for such error.

Fortunately, we need not decide the applicable standard in this particular case. Even under the less demanding *Watson* test, reversal is required. We cannot conclude that there is a reasonable probability that this jury, to which Gray was entitled as a matter of statutory law, would have found him to be a sexually violent predator had it heard the testimony of his expert and his daughter, and listened to argument by his attorney.

¹⁸ *Chapman v. California* (1967) 386 U.S. 18 [87 S.Ct. 824].

DISPOSITION

The judgment is reversed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ

P. J.

We concur:

HOLLENHORST

J.

GAUT

J.